

IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)  
PRELIMINARY DECREE

\* \* \* \* \*

CLAIMANT: Joseph K. Kuzara

**CASE 40A-0083-R-2022**  
40A 204373-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

Water Right Claim 40A 204373-00 appeared in the Preliminary Decree for the Musselshell River, above Roundup (Basin 40A). The claim received issue remarks. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by Water Court order. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot

confirm some aspect of a claim, an issue remark is added to the claim. The claim did not receive any objections or notices of intent to appear.

The Court consolidated this claim into Water Court Case 40A-0083-R-2022 on May 12, 2022. The consolidation order set a filing deadline by which Claimant was to file information resolving the issue remarks. Claimant filed a response on July 11, 2022.

### **FINDINGS OF FACT**

1. Claim 40A 204373-00 appeared with the following issue remarks:

MUSSELSHELL COUNTY RECORDS AS OF 11/13/2014 SHOWS PLACE OF USE IS OWNED BY WILLIAM R. SHIPP.

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE PUMP CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

THE LEGAL LAND DESCRIPTION OF THE PLACE OF USE APPEARS INCORRECT. THE PLACE OF USE APPEARS TO BE LOCATED IN THE SWNWSW OF SECTION 8, T7N, R26E, WHICH AS OF 11/13/2014 IS OWNED BY R THREE INC.

2. Claimant's response is a statement signed by Joseph K. Kuzara along with a marked-up aerial image confirming the point of diversion. Mr. Kuzara states the correct legal land description of the place of use is SWNWSW of Section 8, T7N, R26E.

3. Mr. Kuzara also states the following:

5. Various alterations to the place of use of this water right have taken place over the years, in particular the construction of the current US Highway 87, the excavation of the spring-fed and Half Breed Creek-fed pond (as shown on Map No: 1), and construction of livestock corrals and pens, etc.. As a result, the "Place of Use" area has been and should be reduced to roughly five (5) acres. In addition, these alterations have resulted in a reduction in the utilized Flow Rate from 2.27 cfs to approximately 0.668 cfs or 300 gallons per minute for a total annual utilized Volume of ten (10) acre feet.

6. In conclusion, I believe and therefore submit to this Court that the above referenced Water Right should be finally adjudicated and decreed to reflect the original priority date of April 14, 1930, a flow rate of 0.668 cfs, an annual Volume (May 1 to September 30) of ten (10) acre feet, and an acreage of five (5) acres located in the SW1/4NE1/4SW1/4 of Section 8, Township 7 North, Range 26 East, P.M.M.

4. Although Mr. Kuzara includes a different legal land description in his conclusion, it is likely this is a mistake given the DNRC issue remark on the claim and Mr. Kuzara's previous agreement with the proposed place of use modification.

5. Joseph K. Kuzara is the owner of the parcel in the SWNWSW of Section 8, T7N, R26E according to Montana Cadastral property records.

6. The flow rate, volume, place of use, and priority date were determined by a previous Water Master during adjudication of the Temporary Preliminary Decree in Water Court Case 40A-214. A Master's Report was issued on December 4, 1990. The Master's Report was adopted by the Court via an Order Adopting issued by Chief Water Judge C. Bruce Loble.

7. The description of the place of use of Claim 40A 204373-00 is noted as erroneous in an August 19, 2014 DNRC memorandum. The DNRC indicates the place of use as described at that time encompassed land owned by a person other than Claimant Joseph K. Kuzara. DNRC's recommendation was that the place of use be corrected to SWNWSW of Section 8, T7N, R26E to reflect historical use.

8. The place of use of Claim 40A 204373-00 should be described as SWNWSW of Section 8, T7N, R26E.

9. The Court previously set the flow rate and volume of this claim based on a November 5, 1990 affidavit of Joseph K. Kuzara. Claimant's current request regarding the flow rate and volume would result in an increase in those elements. Additional evidence supporting an increased flow rate and volume was not attached to Claimant's response.

10. The issue remarks should be removed from this claim.

### **APPLICABLE LAW**

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the

claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

4. The Montana Water Court has a statutory obligation and the exclusive authority to adjudicate claims of existing water rights. Rule 1, W. R. Adj. R. An existing water right is a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. Rule 2(a)(22), W.R.C.E.R.

### **CONCLUSIONS OF LAW**

1. The changes described in the Findings of Fact may be made because the evidence in the record overcomes the prima facie status of the claim by a preponderance of the evidence and because evidence before the Court demonstrates the place of use is erroneous.

2. The evidence in the record and the proposed changes provide the Court with a sufficient basis to resolve and remove the issue remarks from the above-captioned claim.

3. The flow rate and volume of the above-captioned claim should remain without substantive modifications because Claimant's statement is not sufficient to contradict and overcome previous evidence on which the court based those elements in Case 40A-214. The priority date of the above-captioned claim should also remain without substantive modification because the Court made a determination of abandonment which resulted in the current priority date.

### **RECOMMENDATIONS**

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A post-decree abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail:**

Joseph K. Kuzara  
PO Box 601  
Roundup, MT 59072

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MUSSELSHELL RIVER, ABOVE ROUNDUP**  
**BASIN 40A**

**Water Right Number:** 40A 204373-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** JOSEPH K KUZARA  
PO BOX 601  
ROUNDUP, MT 59072

**\*Priority Date:** DECEMBER 31, 1950

**Type of Historical Right:** FILED

**Purpose (use):** IRRIGATION  
**Irrigation Type:** SPRINKLER

**\*Flow Rate:** 85.00 GPM

**\*Volume:** 7.50 AC-FT

THE WATER COURT HAS DETERMINED THAT A VOLUME QUANTIFICATION IS  
REQUIRED TO ADEQUATELY ADMINISTER THIS RIGHT.

**Climatic Area:** 1 - HIGH

**\*Maximum Acres:** 5.00

**Source Name:** HALFBREED CREEK  
**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWSW	8	7N	26E	MUSSELSHELL

**Period of Diversion:** MAY 1 TO SEPTEMBER 30

**Diversion Means:** PUMP

**Period of Use:** MAY 1 TO SEPTEMBER 30

**\*Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	5.00		SWNWSW	8	7N	26E	MUSSELSHELL
<b>Total:</b>	5.00						